In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 995

T. A. SMALL,
Petitioner,

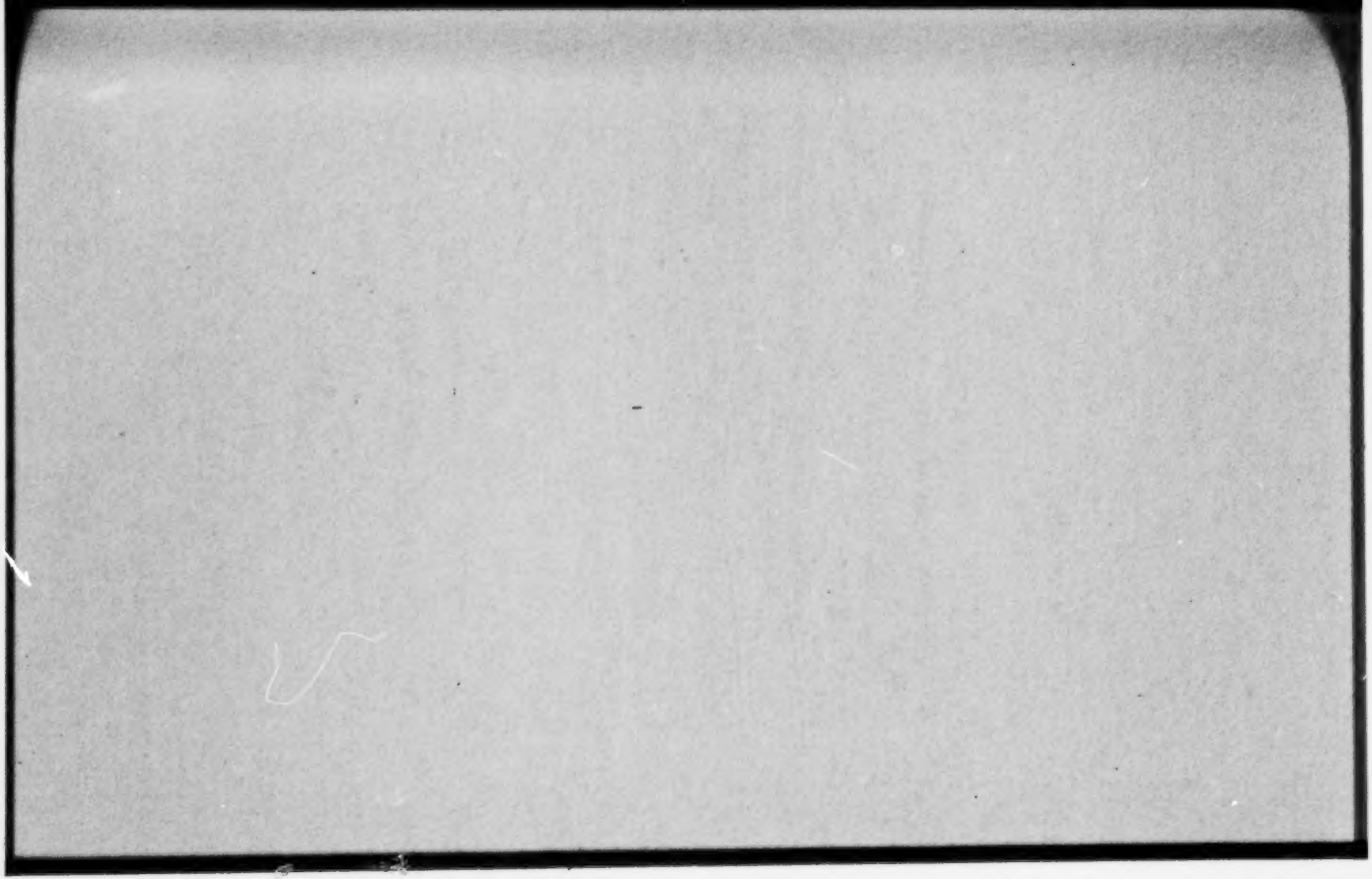
vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

MAX H. MARGOLIS,
1650 Russ Building, San Francisco 4, California,
Counsel for Petitioner.

FRED MCDONALD,
Mills Tower, San Francisco 4, California,
Of Counsel.



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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, T. A. Small, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final judgment of said court, entered January 25, 1946,

affirming the judgment of the District Court of the United States for the Northern District of California, Southern Division.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is contained in the record. (R. 50-54.) No opinion was rendered by the Circuit Court of Appeals in denying a petition for rehearing on February 26, 1946. (R. 55.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

By an information with a single count petitioner was charged with violating the Emergency Price Control Act of 1942 (50 U.S.C.A., secs. 902 (a), 904 (a), 925 (b)) by selling 100 cases of certain whiskey at a price "in excess of and higher than the maximum price established by law". (R. 2-3.) He pleaded "Not Guilty" (R. 4), and a jury trial was had. (R. 5-6.)

When the Government rested its case, the petitioner also rested (R. 34) and moved for a directed verdict (R. 35.) In denying this motion, the trial court said in the absence of the jury, "I am going to tell the jury that there was no sale but there was an attempted sale." (R. 35.) The jury was thereafter instructed that the evidence did not support the charge of sale (R. 36, 38), but that petitioner

might be found guilty of "an attempt to sell" (R. 38.) Neither the Government nor the petitioner objected or excepted to these instructions. (R. 41.)

Contrary to the law thus declared by the trial court, the jury found petitioner guilty of sale. (R. 7.) And contrary to the law thus declared to the jury, the trial court denied a motion for new trial specifying that the verdict was contrary to law (R. 7-8) and entered judgment sentencing petitioner to imprisonment for six months on the jury verdict convicting him of sale. (R. 10-11.)

The judgment thus entered contrary to law on a verdict contrary to law, was affirmed by the Circuit Court of Appeals. (R. 54-55.) It rejected the law of the case as declared by the trial court to the jury. It determined upon an erroneous conception of the law of sales that the evidence supported a conviction of sale. The scope of the decision, therefore, is to sanction refusal by a jury, in the administration of criminal justice, to accept the law as declared by the trial court, to sanction acceptance by a trial court, in the administration of criminal justice, of the law as dictated by the jury, and to sanction disregard by an appellate court, in the administration of criminal justice, of the law of the case established in the trial court.

JURISDICTION.

Jurisdiction of this court is invoked under section 240 of the Judicial Code. (28 U.S.C.A., sec. 347 (a).)

QUESTIONS PRESENTED.

1. In the proper administration of criminal justice, may a trial court enter judgment on a jury verdict which is contrary to the law as declared by the trial court?

2. In the proper administration of criminal justice, may an appellate court base an affirmance of such judgment on the ground that the trial court had wrongly declared the law to the jury?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(a) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court and with decisions in other circuits on a serious question in the administration of criminal justice by trial courts.

In all civil and criminal cases in the federal courts the rule is general that "it is the duty of the jury to accept the law as declared by the court."

> *Hepner v. United States,* 213 U. S. 103, 29 S. Ct. 474, 479, 52 L. Ed. 720.

With more elaboration, the rule is stated in *Sparf v. United States,* 156 U. S. 51, 101, 15 S. Ct. 273, 293, 39 L. Ed. 343, 361, as follows:

> "We must hold firmly to the doctrine that in the courts of the United States it is the duty

> of juries in criminal cases to take the law from the court, and apply that law to the facts as they, upon their conscience, believe them to be. Under any other system, the courts although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.

And in *Stetson v. Stindt,* 3 Cir., 279 F. 209, where a verdict by the jury was contrary to the law as declared by the trial court but the court nevertheless entered judgment on the verdict, it was said at page 211 after a review of pertinent cases:

> "We are persuaded by the *ratio decidendi* of the last line of authorities that a verdict like the one under consideration, which is perverse and directly violative of the charge of the court and is wholly without evidence to support it, cannot stand. It is not sufficient to say that the defendant cannot complain because he was not injured. He was injured by being deprived of the right of a litigant to have the jury determine his liability under the law as laid down by the court."

That the verdict against petitioner violated the rule of the foregoing cases, is plain. The information contained but one charge—that of sale. (R. 2-3.) The court instructed the jury that petitioner could

not be convicted of sale, but might be convicted of "an attempt to sell". (R. 36, 38.) The jury nevertheless returned the following verdict: "We, the Jury, find T. A. Small, the defendant at bar Guilty". (R. 7.) This was a conviction on the charge of sale. The decision of this court in *St. Clair v. United States,* 154 U. S. 134, 14 S. Ct. 1002, 1010, 38 L. Ed. 936, leaves no doubt in this respect. It was there said:

> "The indictment contained but one charge,—that of murder. The accused was arraigned, and pleaded not guilty of that charge. And while the jury had the physical power to find him guilty of some lesser crime necessarily included within the one charged, or of an attempt to commit the offense, the law will support the verdict with every fair intendment, and therefore will, by construction, supply the words 'as charged in the indictment.' The verdict of 'guilty' in this case will be interpreted as referring to the single offense specified in the indictment. And this principle has been incorporated into the statute laws of some of the states; as in California whose Penal Code declares that a verdict of 'Guilty,' or 'not Guilty,' shall import a conviction or acquittal of the offense charged in the indictment. Section 1151."

The trial court approved and confirmed the perverse verdict convicting petitioner of sale, by entering judgment thereon. (R. 11.) It thereby relaxed its duty to declare the law in criminal cases. It thereby tolerated encroachment upon that duty by the jury. It thereby permitted the jury to impair

that duty. If the system under which criminal justice has heretofore been administered in the federal courts is to be preserved and maintained, it is obvious that relaxation, toleration, and permission in such respects should be speedily curbed. The affirmance of the judgment by the Circuit Court of Appeals was a step the other way.

(b) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court and with its own decisions and decisions in other circuits on a serious question in the administration of criminal justice by appellate courts.

On denying the motion for a directed verdict, the trial court said, "I am going to tell the jury that there was no sale but there was an attempted sale". (R. 35.) This was an assurance to petitioner that he need not propose or request instructions on the law of sales. Pursuant to said promise, the trial court instructed the jury that petitioner could not be convicted of sale but might be convicted of "an attempt to sell". (T. 36, 38.) Neither the Government nor the petitioner objected or excepted to these instructions. (R. 41.) Nowhere in the jury charge was the law of sales expounded. (R. 36-41.) Accordingly it became the law of the case, binding on the jury, binding on the trial court, and binding on the appellate court that petitioner could not be convicted of sale. The general rule in this respect is thus stated in 53 American Jurisprudence 620, sec. 844:

> "An instruction not objected or excepted to is not before the appellate court for review, but must for the purpose of the case be taken as the law. Right or wrong the instruction becomes

> the law of the case and is binding upon the jury, except where they are judges of the law, as well as on the court and counsel."

Cases earlier cited confirm this general rule in its application to civil and criminal cases in federal courts.

Hepner v. United States, 213 U.S. 103, 29 S. Ct. 474, 479, 52 L. Ed. 720;

Sparf v. United States, 156 U.S. 51, 101, 15 S. Ct. 273, 293, 39 L. Ed. 343, 361;

Stetson v. Stindt, 3 Cir., 279 F. 209, 211.

The doctrine of the law of the case therefore demanded that the judgment be reversed. But the Circuit Court of Appeals rejected the law of the case and affirmed the judgment because it deemed the evidence sufficient to warrant a conviction under the law of sales as announced by it on appeal. Accordingly, the effect of the decision is that in criminal cases a conviction and judgment contrary to law may be affirmed if the appellate court revises the law on appeal. This must necessarily operate to deprive the defendant in a criminal case of substantial rights. Primarily, it deprives him of the right to have the jury determine his guilt on the law as declared by the trial court. And it leaves him bewildered and unprepared in proposing and requesting instructions, for no matter what the trial court may say or do he must anticipate that an appellate court will say or do something different to support whatever verdict the jury may render.

Perhaps it may be said that in humble cases like the present the injury to a defendant cannot be great even if he is denied the full measure of due process of law. But the rule thus innovated would have equal application to a charge of murder. If on the trial of a murder charge the court had accepted a verdict finding the defendant guilty of murder and had sentenced him to death in the face of jury instructions confined to the law of manslaughter and telling the jury that the defendant could only be found guilty of manslaughter, few could doubt that such judgment would be speedily reversed on appeal. And if the judgment were nevertheless affirmed on appeal because the appellate court deemed the evidence sufficient to support a conviction of murder, few could doubt that the affirmance reflected a palpable denial of due process of law.

In the present case, moreover, it is apparent that the law of sales announced in the opinion of the appellate court is in conflict with the decisions of this court, its own decisions, and the decisions in other circuits on the subject. In other words, that the law of the case as declared by the trial court was right and the law as revised in the appellate court was wrong.

The Circuit Court of Appeals decided that petitioner had made an actual sale of whiskey. (R. 53-54.) This conclusion was based upon undisputed evidence showing the following: Petitioner agreed to sell 100 cases of whiskey for $4600 and accepted a deposit of $1975; he did not have title to any whiskey;

he did not control any whiskey; he had no whiskey to transfer; no specific whiskey was ever identified as the subject of sale; no whiskey was ever delivered; the deposit of $1975 was returned. (R. 16-18; 19-25; 26-28; 31-32.)

Under the settled law of sales, the foregoing circumstances defeated a conclusion that petitioner sold whiskey.

State of Iowa v. McFarland, 110 U.S. 471, 478, 4 S. Ct. 210, 214, 28 L. Ed. 198.

Hawaiian Gas Products Co. v. Comm. Int. Rev., 9 Cir., 126 F. 2d 4, 5.

Rogers v. Comm. Int. Rev., 9 Cir., 103 F. 2d 790, 792.

Perata v. Comm. Int. Rev., 9 Cir., 89 F. 2d 550, 552.

Fox v. United States, 4 Cir., 34 F. 2d 99, 100.

In *Hawaiian Gas Products Co. v. Comm. Int. Rev.,* 9 Cir., 126 F. 2d 4, it was said, at page 5:

> " 'A sale', said the Supreme Court in the Five Per Cent Cases (State of Iowa v. McFarland, 110 U.S. 471, 478, 4 S. Ct. 210, 214, 28 L.Ed. 198), 'in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent'."

In *Perata v. Comm. Int. Rev.,* 9 Cir., 89 F. 2d 550, it was said, at page 552:

> "The distinction between a contract of sale and a sale is shown in 55 C.J. 39, sec. 5: 'A contract to sell goods, as distinguished from a sale, is a contract whereby the seller agrees to transfer

the property in goods to the buyer for a price which the buyer pays or agrees to pay, as where there is no price paid for the goods and no delivery of them. * * * A contract to sell is merely a promise of an executory nature, and until it is executed gives merely a right of action for its breach, or specific performance, and does not pass the property in goods or chattels, whereas a sale is in the nature of a conveyance or transfer of title'."

And in *Fox v. United States,* 4 Cir., 34 F. 2d 99, where a conviction for sale in violation of the National Prohibition Act was reversed, the court said, at pages 99 and 100:

(99) "In the second place, there was no delivery of liquor by the defendant or by any one acting in his behalf. The statute (27 USCA, sec. 12) provides that, 'no person shall manufacture, *sell,* barter, transport, import, export, (100) deliver, furnish or possess any intoxicating liquor,' etc., and the violation of the statute with which defendant is charged is selling. An executory contract to sell might, in a proper case, constitute a conspiracy to violate the act * * *; but there could not be a sale in violation thereof unless the sale were completed by delivery, either actual or constructive, which is not present in this case. 'The offense of illegally selling liquor is not committed by a bargain or executory contract for a sale. There must be a completed sale, which passes the property, consummated by the act of the parties as distinguished from the operation of law, and amounting to a vending and purchasing of the par-

ticular commodity.' (33 C.J. 591; Filatreau v. United States, 14 F. 2d 659; * * *.)

It is elementary that a sale involves a transfer of title, and that there can be no sale until a specific chattel has been ascertained and identified. Here there was no transfer of title to any intoxicating liquor and no liquor was ascertained or identified as the subject of sale. The most that can be said, even if the transaction between defendant and Allen be construed as a bona fide agreement on the part of defendant to deliver liquor to Allen, is that there was a mere executory contract to sell. This is not a sale. The distinction is pointed out in Mechem on Sales, par. 5, quoting Chalmers on Sales, as follows:

' "By an agreement to sell," it has been said "a jus in personam is created; by a sale a jus in rem is transferred. If an agreement to sell be broken, the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes. * * * But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against him, but also the usual proprietary remedies against the goods themselves, such as an action for conversion and detinue." '

The distinction is well stated by Prof. Williston in the second edition of Williston on Sales, par. 2, as follows:

'Whether a bargain between parties is a contract to sell or an actual sale depends upon whether the property in the goods is transferred. If it is transferred, there is a sale, an

executed sale, even though the price be not paid. Conversely, though the price be paid, there is but a contract to sell (not very happily called an executory sale), if the property in the goods has not passed. * * * '

In Filatreau v. United States, 14 F. 2d 659, the Circuit Court of Appeals of the Sixth Circuit Court held that there was no sale within the prohibition of the statute where there was no delivery even though the contract had been agreed and the whiskey had been sent for and was ready to be delivered."

CONCLUSION.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final judgment of said court in said cause be reviewed and reversed.

Dated, San Francisco, California,
March 20, 1946.

MAX H. MARGOLIS,
Counsel for Petitioner.

FRED MCDONALD,
Of Counsel.